

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RANDI D. WOODDELL,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

NO. CV-11-250-RHW

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 13 and Defendant's Motion for Summary Judgment, ECF No. 16. The motions were heard without oral argument. Plaintiff is represented by Maureen J. Rosette. Defendant¹ is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Alexess D. Rea.

I. Jurisdiction

On May 13, 2009, Plaintiff Randi Donald Wooddell filed an application for Social Security Disability Insurance Benefits (SSDIB). Plaintiff alleges he has

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 been disabled since January 15, 2008.

2 His application was denied initially on August 5, 2009, and again denied on
3 reconsideration on October 6, 2009. A timely request for a hearing was made. On
4 August 4, 2010, Plaintiff appeared at a video hearing in Spokane, Washington
5 before Administrative Law Judge (ALJ) James W. Sherry. Thomas A. Polsin,
6 vocational expert, also appeared and testified at the hearing. Plaintiff was
7 represented by Dana Madsen.

8 The ALJ found that Plaintiff was not disabled from January 15, 2008
9 through August 5, 2010. Plaintiff timely requested review by the Appeals Council,
10 which was denied June 15, 2011. The Appeals Council's denial of review makes
11 the ALJ's decision the final decision of the Commissioner. (42 U.S.C. §405(h)).
12 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern District
13 of Washington on July 1, 2011. The instant matter is before the district court
14 pursuant to 42 U.S.C. § 405(g).

15 **II. Sequential Evaluation Process**

16 The Social Security Act defines disability as the "inability to engage in any
17 substantial gainful activity by reason of any medically determinable physical or
18 mental impairment which can be expected to result in death or which has lasted or
19 can be expected to last for a continuous period of not less than twelve months."

20 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
21 under a disability only if his impairments are of such severity that the claimant is
22 not only unable to do his previous work, but cannot, considering claimant's age,
23 education and work experiences, engage in any other substantial gainful work
24 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
27 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
2 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
3 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
4 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
5 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
6 416.920(b). If he is not, the ALJ proceeds to step two.

7 Step 2: Does the claimant have a medically-severe impairment or
8 combination of impairments? 20 C.F.R. §§ 404.1520©, 416.920©. If the claimant
9 does not have a severe impairment or combination of impairments, the disability
10 claim is denied. A severe impairment is one that lasted or must be expected to last
11 for at least 12 months and must be proven through objective medical evidence. 20
12 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is severe, the evaluation
13 proceeds to the third step.

14 Step 3: Does the claimant's impairment meet or equal one of the listed
15 impairments acknowledged by the Commissioner to be so severe as to preclude
16 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
17 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
18 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
19 impairment is not one conclusively presumed to be disabling, the evaluation
20 proceeds to the fourth step.

21 Step 4: Does the impairment prevent the claimant from performing work he
22 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
23 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
24 perform this work, the ALJ proceeds to the fifth and final step.

25 Step 5: Is the claimant able to perform other work in the national economy
26 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
27 416.920(f).

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1 The initial burden of proof rests upon the claimant to establish a prima facie
2 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
3 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
4 mental impairment prevents him from engaging in his previous occupation. *Id.* At
5 step five, the burden shifts to the Commissioner to show that the claimant can
6 perform other substantial gainful activity. *Id.*

7 **III. Standard of Review**

8 The Commissioner's determination will be set aside only when the ALJ's
9 findings are based on legal error or are not supported by substantial evidence in
10 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
11 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
12 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
13 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
14 evidence is "such relevant evidence as a reasonable mind might accept as adequate
15 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
16 ALJ's denial of benefits if the evidence is susceptible to more than one rational
17 interpretation, one of which supports the decision of the administrative law judge.
18 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
19 support either outcome, the court may not substitute its judgment for that of the
20 ALJ." *Matney*, 981 F.2d at 1019.

21 A decision supported by substantial evidence will be set aside if the proper
22 legal standards were not applied in weighing the evidence and making the
23 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
24 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
25 immaterial to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec.*
26 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

27 **IV. Statement of Facts**

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1 The facts have been presented in the administrative transcript and the ALJ's
2 decision and will only be summarized here.

3 Plaintiff served in the United States Air Force from January 1975 to January
4 1995, when he was honorably discharged. (Tr. 42.) He was an electronics
5 technician for aircraft electronic systems. (Tr. 42.) Plaintiff has hearing loss and
6 wears hearing aids. (Tr. 21.) His right eye was removed in 2005 as a result of
7 melanoma. (Tr. 21.) He wears a prosthetic right eye, and has prescription glasses
8 for his left eye. (Tr. 21.) Although he has high blood pressure and cholesterol,
9 these conditions are being controlled with medication. (Tr. 22.)

10 Since his discharge from the military, Plaintiff has worked a number of jobs,
11 including marine engine mechanic, security guard, punch press operator, and he
12 worked at U-haul services rental trailers. (Tr. 44-47.) Plaintiff's last attempt at
13 employment was as a marine engine mechanic and it lasted two weeks. He was
14 discharged because he could not keep up with the required pace. (Tr. 158.)

15 At the hearing, Plaintiff testified that he did not have problems with his
16 back, other than occasionally back spasms, for which he takes medication. (Tr. 48)
17 Plaintiff has a driver's license, which he obtained by taking a special driving test.
18 (Tr. 48).

19 **V. The ALJ's findings**

20 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
21 activity since January 15, 2008, the alleged onset date (Tr. 21.)

22 At step two, the ALJ found Plaintiff has the following severe impairments:
23 Status-post Right Eye Enucleation with Prosthetic Installation; Right Eye
24 Blindness; and High-Frequency Sensorineural Hearing Loss. (Tr. 21.) The ALJ
25 found that Plaintiff's high blood pressure and cholesterol were controlled with
26 medication and did not interfere with his functioning to any significant extent (Tr.
27 22.)

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1 At step three, the ALJ reviewed listings 2.02 (Loss of Visual Acuity), 2.03
2 (Contraction of the Visual Field in the Better Eye), 2.04 (Loss of Visual
3 Efficiency), and 2.08 (Hearing Impairments). The ALJ concluded that Plaintiff's
4 vision impairments do not meet or medically equal the listings, and his hearing
5 loss does not meet or medically equal listing 2.08. (Tr. 22.)

6 At step four, the ALJ found that Plaintiff has the residual functional
7 capacity to perform a full range of work at all exertional levels, but with the
8 following nonexertional limitations: frequent balance, stoop, crouch, kneel and
9 crawl; occasional climbing ramps or stairs, but never ladders, ropes, or scaffolds;
10 avoid concentrated exposure to excessive noise, unprotected heights, and the use
11 of moving machinery; and limited to occupations requiring no more than
12 occasional near, far, and peripheral acuity, depth perception, or color vision. (Tr.
13 22-23.) The ALJ then concluded that Plaintiff was capable of performing past
14 relevant work as an Industrial Cleaner and a Car Cleaner, and noted that this work
15 does not require the performance of work-related activities precluded by Plaintiff's
16 residual functional capacity. (Tr. 25.)

17 **VI. Issues for Review**

18 Plaintiff presents the following issues with respect to the ALJ's findings:

- 19 1. There is not substantial evidence to support the ALJ's decision.
- 20 2. The ALJ erred in not including additional physical limitations in the
21 residual functional capacity (RFC) assessment.
- 22 3. The ALJ erred in rejecting his testimony regarding his limitations from
23 his impairments.

24 **VII. Discussion**

25 The Court has reviewed the briefing and the medical records and concludes
26 the ALJ did not err in finding that Plaintiff was not disabled. There is substantial
27 evidence to support the ALJ's decision, and he gave Plaintiff's testimony
28

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1 regarding his impairments proper weight.

2 In his Disability Report, Plaintiff indicated that his hearing loss and right
3 eye blindness limited his ability to perform work. In his Functional Report, he
4 stated his conditions affect his ability to reach, see, hear, climb stairs, and walk. At
5 the hearing, Plaintiff testified that he struggles with depth perception and
6 peripheral acuity, and he occasionally falls if he does not see a depression in the
7 ground. He also testified that he bumped his arm and has experienced numbness in
8 his right hand. He stated he walks at a much slower pace, he can lift around 20 lbs,
9 and can walk a quarter mile before his back bothers him.

10 The ALJ found that Plaintiff's medically determinable impairments could
11 reasonably be expected to cause the alleged symptoms, but his statements'
12 concerning the intensity, persistence and limiting effects of the symptoms are not
13 credible, to the extent they are inconsistent with the residual functional capacity
14 assessment. (Tr. 23.) The ALJ found the objective medical evidence and Plaintiff's
15 self-reports of activity did not support the level of limitation claimed. (Tr. 23.)

16 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
17 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
18 evidence of malingering, the ALJ must give "specific, clear and convincing
19 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*
20 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted); *accord Taylor v.*
21 *Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234 (9th Cir. 2011) (*citing*
22 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).² If the ALJ's
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24
25 ²Defendant argues the Court need only determine whether the ALJ properly
26 made "specific," cogent findings, supported in the record, for rejecting a
27 claimant's subjective symptom testimony, rather than "clear and convincing
28 evidence." Indeed, some cases have held that, at a minimum, an ALJ must make

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credibility finding is supported by substantial evidence in the record, the reviewing court “may not engage in second-guessing.” *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

In recognition of the fact that an individual’s symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone, 20 CFR 404.1529© and 416.929© describe the kinds of evidence, including the factors below, that the ALJ must consider in addition to the objective medical evidence when assessing the credibility of an individual's statements:

1. The individual’s daily activities;
2. The location, duration, frequency, and intensity of the individual’s pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;

specific, cogent findings, supported in the record, to reject a claimant’s subjective symptom testimony. *See, e.g., Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir.2010); *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990); *see also* Social Security Ruling.(“SSR”) 96–7p (“When evaluating the credibility of an individual’s statements, the adjudicator must consider the entire case record and give specific reasons for the weight given to the individual's statements”). The majority of cases apply the clear and convincing standard. Out of an abundance of caution, this Court shall apply the arguably more rigorous “clear and convincing” standard.

1 6. Any measures other than treatment the individual uses or has used to
2 relieve pain or other symptoms (e.g., lying flat on his or her back, standing
3 for 15 to 20 minutes every hour, or sleeping on a board); and

4 7. Any other factors concerning the individual's functional limitations and
5 restrictions due to pain or other symptoms.

6 SSR 96-7P, 1996 WL 374186.

7 Here, the ALJ did not commit legal error in his consideration of Plaintiff's
8 testimony and did not err in not crediting Plaintiff's reports of his limitations
9 caused by his impairments. The ALJ considered the objective medical evidence as
10 well as the factors listed above. Plaintiff indicated that he is able to perform all
11 housework and he periodically helps friends and relatives with yard work and
12 house maintenance. He also goes fishing four to five times a week, weather
13 permitting. He has adequate vision in his left eye to drive. Plaintiff testified that he
14 had no problem sitting, standing, or walking in general, although he said he did
15 have some difficult bending when he experiences back spasms, which do not
16 appear to be frequent.

17 Plaintiff's testimony reflects that he is active and capable. He works on the
18 computer. Moreover, there is nothing in the record to substantiate Plaintiff's self-
19 reported limitation of lifting 20 lbs. While Plaintiff reported that he was mainly
20 sedentary at the time, it was because of monetary concerns rather than any
21 physical limitations. On the contrary, Plaintiff indicated he wanted to get out and
22 do more, and hoped to work with returning soldiers if he had transportation. There
23 is nothing in the record that indicates that Plaintiff's vision, hearing loss, arm
24 injury, and back impairments would prevent him from working.³ Notably, no
25

26 ³The ALJ considered the letter from Plaintiff's former employer, who indicated
27 that Plaintiff was fired due to his slow production, but gave in little weight. The
28 ALJ noted it was possible that Plaintiff was still in the learning stages of the new

1 medical source opinions have concluded that Plaintiff is unable to work.

2 The ALJ's credibility and RFC determinations are supported by substantial
3 evidence in the record. Moreover, substantial evidence supports the ALJ's
4 conclusion that Plaintiff can perform his past work as a car cleaner and industrial
5 cleaner.

6 **VIII. Conclusion**

7 Plaintiff has not met his burden of showing that the ALJ committed legal
8 error, or that his conclusion that Plaintiff was not disabled was not supported by
9 substantial evidence.

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment, ECF 13, is **DENIED**.

12 2. Defendant's Motion for Summary Judgment, ECF No. 16, is
13 **GRANTED**.

14 3. The decision of the Commissioner denying benefits is **affirmed**.

15 4. The District Court Executive is directed to enter judgment in favor of
16 Defendant and against Plaintiff.

17 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
18 file this Order and provide copies to counsel, and **close the file**.

19 **DATED** this 23rd day of July, 2013.

20 *s/Robert H. Whaley*
21 **ROBERT H. WHALEY**
22 United States District Judge

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27 job. Moreover, the ALJ and the vocational expert did not find that Plaintiff was
28 capable of performing this past relevant work (marine engine repair).

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